

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,551

108

United States Court of Appeals
For the
District of Columbia Circuit
FILED
AUG - 7 1958
Joseph W. Starnick
CLERK

JEROME S. MURRAY,

Appellant,

v.

SAMUEL A. DE VITO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENIS K. LANE

412 5th Street, N. W.

Washington, D. C.

Attorney for Appellant

STATEMENT OF QUESTIONS PRESENTED

Does the provision for an assignor of a lease for a term of years to remain liable for the covenants of a lease to the Lessor create a sublease when the parties have expressly intended an assignment?

Does the provision of remaining liable upon the part of a lessee who assigns his term have the effect of preventing the divestment of his interest or give him a reversionary interest when neither right is expressed in the assignment or within the terms of the lease?

(i)

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINTS	3
SUMMARY OF ARGUMENT	3
ARGUMENT	3

CASES CITED

In Re Famous Fain Co., Circuit Court of Appeals, Second Circuit, 13 F. (2d) 529	4
Kandis et al. v. Pusch, 86 Ind. App. 246, 155 N. E. 618	5
T.A.D. Jones Co. v. Winchester Repeating Arms Co., 61 F. (2d) 774	5
Waller et ux v. Commissioner of Internal Revenue, Circuit Court of Appeals, Fifth Circuit, 40 F. (2d) 892	4

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,551

JEROME S. MURRAY,

Appellant,

v.

SAMUEL A. DE VITO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

A judgment was entered by the District Court in favor of appellee on the 19th day of May , 1958 (App.10). Appellant invokes the jurisdiction of this court as provided in Title 28, U.S. Code, Sections 1291 and 1292, to review and reverse the judgment of the District Court.

STATEMENT OF THE CASE

Appellee, Samuel A. DeVito, was the proprietor of a restaurant in the 600 block of D Street, N. W., in the District of Columbia. While operating the business he had a lease from the owners (App. 4). Later, he sold the business to one Emily G. Fort, and the lease was assigned to the purchaser who agreed to accept the lease "with all of its conditions and covenants as if originally signed by me". DeVito agreed to remain liable to the lessors in the event of failure by the assignee. The owners in writing approved the assignment of the term. Sale of the business was made by DeVito to Fort on or about February 10, 1954. Assignment of the lease was made April 27, 1954. The purchaser Fort went into possession. Subsequently, appellant Murray purchased the property from the lessors. Fort, the assignee, became delinquent in the rent to him and turned over the key to the building to the appellant in order to end her liability and another key to appellee. Appellant entered into possession and refused to accept rent from DeVito when tendered by him. DeVito filed an action below against the assignee, Fort, and the appellant. Fort filed a Suggestion of Bankruptcy. Subsequent to the filing of the suit, DeVito was permitted to remove all personal property and fixtures of all kinds from the building. The pre-trial order provided that the trial court should first hear evidence with respect to the question of liability. At the trial certain facts were stipulated, the documents involved were admitted. No testimony was taken. After argument of counsel, the court decided that there was liability upon the part of the defendant based upon breach of contract. Subsequently evidence was offered as to damages which proceeding is not involved directly in this appeal and upon the basis of the finding of liability and the further testimony as to damages the judgment was entered by the court and this appeal was then taken.

STATEMENT OF POINTS

The appellant claims that the Court below erred in respect to its interpretation and construction of the lease and the assignment thereof all of which was in writing. In arriving at the finding of liability the District Court considered its terms and made its finding citing no cases of any court to support the view taken. The liability determined was based upon the supposed contractual right of the appellee.

SUMMARY OF ARGUMENT

The Court in arriving at its finding that the agreement to assign the term was in fact a sublease by virtue of the provision of the continuing liability of the lessee-assignor ignored the rule that without such language he is still liable under his covenant for rent and this written expression therefor of his legal liability forms no basis for a change in the express terms of the agreement. Appellant maintains that the surrender of the key by the assignee to the owner of the property who had no contractual agreement with appellee gave appellant the right to possession and in maintaining his possession violated no contractual right of appellee.

ARGUMENT

Judge Holtzoff construed the effect of the assignment as follows:

"* * * Perhaps it might be more accurate to say that the original tenant never became divested of his original property because the contractual relation between him and the landlord, by the very terms of the document, remained in effect." (App. 15)
 "Since the Court is of the opinion that the tenancy for years created by the original lease had not been affected by the purported assignment, which was really a sublease * * *"

Appellant says that this is an erroneous conclusion. This would eliminate all assignments of leases and require all to be given effect of sub-leases. The law in the majority of jurisdictions is just the opposite.

See In Re Famous Fain Co., Circuit Court of Appeals, Second Circuit, 13 F. (2d) 529, where the Court says:

"It is the well-settled rule of law that, after an assignment of the lease and an acceptance of rent by the landlord from the assignee the landlord cannot maintain an action of debt for rent against the lessee, but an action will lie against him on the covenant for the payment of rent. The reason of the rule is that, although by the assignment the privity of estate between lessor and lessee is terminated, there still remains the privity of contract created by the lease, which is not affected by the assignment. The lessee still continues liable on his covenant by virtue of the privity of contract".

It is submitted that under this well settled rule of law that DeVito's undertaking in connection with the assignment is a contractual one which if not expressed would still have been implied in an assignment and there is no reason why the terms of the assignment should be ignored because of the spelling out of his contract with the Anselmos.

It is not necessary to consider at this point the various changes in the covenants of a lease which may result in a sub-lease which are discussed in Tiffany, Law of Real Property, Section 123, Third Edition, Volume 1 at Page 196, et seq. because no additional provisions were made between the assignor and the assignee. By the terms of the agreement he reserved no right of reentry and parted with his entire interest.

The determining factor is the provision with respect to what he is assigning. Is he parting with his entire interest? Is he retaining a part of the demised premises? These are the questions involved in the distinguishing of an assignment from a sub-lease. See Waller et ux v. Commissioner of Internal Revenue, Circuit Court of Appeals, Fifth Circuit, 40 F. (2d) 892.

In a case somewhat similar to this Kandis et al v. Pusch, 86 Ind. App. 246, 155 N.E. 618 the court said:

"Had appellants desired to repossess themselves of the premises they could have done so by subletting the premises, reserving to themselves the right of reentry upon default *****."

The general rule seems to favor construing a lease and transfer as an assignment rather than a subletting. See T.A.D. Jones Co. v. Winchester Repeating Arms Co., 61 F.(2d) 774, an opinion by Judge Learned Hand. Liability in this case has been fixed upon appellant because he refused to permit appellee to reenter the premises where the lease had no provision or the assignment had no provision which gave appellee the right to reenter. Unless this is a subletting then of course the judgment was erroneous because the assignor has no right to possession after the assignment unless there is consent on the part of the owner. Murray having refused consent relieved both Fort and DeVito of further liability under the lease.

To succeed in the action, it was necessary to show that some right to possession of the appellee based on contract was violated. He had no contract express or implied with appellant.

There was no violation of any right of the appellee arising from the agreement. The agreement was silent as to reentry.

It is respectfully urged that this Court should reverse and remand with directions to the Court below to find that there was no violation of the terms of the agreement by the appellant hence no liability upon his part and that judgment be entered in favor of the appellant.

Respectfully submitted,

DENIS K. LANE

412 5th Street, N. W.
Washington, D. C.

Attorney for Appellant.

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Complaint (Damages and Injunction)	53	1
Plaintiff's Exhibit No. 1 Lease Agreement	57	4
Suggestion of Bankruptcy by Emily G. Fort	61	8
Defendant Fort Exhibit "A"	62	9
Answer to Complaint by Defendant Jerome S. Murray	63	9
Judgment	70	10
Notice of Appeal	71	11
Excerpts from Transcript of Proceedings	1	11
Excerpts from Transcript of Proceedings		

JOINT APPENDIX

53 [Filed January 27, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIASAMUEL A. DE VITO,
2216 S Street, N.E.
Washington, D. C.

Plaintiff,

vs.

JEROME S. MURRAY,
400 Sixth Street, N. W.,
Washington, D. C.EMILY G. FORT,
1313 Massachusetts Avenue, N. W.
Washington, D. C.

Defendants.

Civil Action No. 366-56

COMPLAINT
(Damages and Injunction)

The plaintiff respectfully shows to the Court as follows:

1. That for the past fifteen or more years the plaintiff, Samuel A. DeVito, was engaged in the restaurant business at the premises 615 D Street, N. W., in the District of Columbia. On February 19, 1954, a renewal lease was entered into between the said Samuel A. DeVito, as Lessee, and Michael A. Anselmo, Ursula T. Anselmo and Louise Michalowicz, as Lessors, for said premises, at the monthly rental of one hundred and ninety dollars (\$190.00) for the first three years, and two hundred dollars (\$200.00) from August 1, 1957 to the termination of the lease, for the term of six years commencing on the first day of August, 1954, and ending on the thirty first day of July, 1960.

2. On April 27, 1954, the plaintiff transferred all his right, title and interest in the agreement to Emily G. Fort, agreeing to remain liable to the Lessors for compliance of the conditions and covenants of the lease in the event of failure by the transferee, as will appear from the reverse side of said lease. At the same time, and on the reverse side

of said lease, the said defendant, Emily G. Fort, accepted the lease with all of its conditions and covenants as if originally signed by her. Likewise, the Lessors signified their consent to the above transfer by signing the same on the reverse side of said lease.

54 3. On the tenth day of February, 1954, the said Samuel A. DeVito sold, by conditional sales contract, all of the stock of goods, wares and merchandise, including all fixtures and equipment, in said premises, to the said Emily G. Fort, in consideration of fourteen thousand two hundred and twenty five dollars (\$14,225.00), the present balance thereon being eight thousand six hundred and two dollars (\$8,602.00). The conditional bill of sale was duly recorded in the Office of the Recorder of Deeds for the District of Columbia on the 30th day of March, 1954.

4. On January 13, 1956, the plaintiff herein was advised by the defendant, Emily G. Fort, that she could no longer continue the operation of said restaurant business, that she was in default in her rent, and surrendered her lease, and the keys to the premises, to the plaintiff herein. The plaintiff accepted the surrender of the lease and the keys, and proceeded to retake possession of the premises, as the guarantor upon said lease. On January 15, 1956 this plaintiff mailed his certified check in the amount of one hundred and ninety dollars (\$190.00) to the defendant, Jerome S. Murray, in payment of the rent due January 1, 1956. The said Jerome S. Murray had acquired the title to said premises from the former owners, and Lessors, subject, however, to the aforementioned lease to the plaintiff herein. Possession of said premises was taken by the plaintiff on January 13, 1956.

5. On January 18, 1956, the plaintiff received a letter from the defendant, Jerome S. Murray, dated January 17, 1956, advising him that the defendant, Emily G. Fort, has turned over possession to him of the herein mentioned premises and returned the certified check which the plaintiff had sent him for the January rent. He was further advised to remove the property contained in said conditional bill of sale from the premises by noon, January 21, 1956.

6. That on or about January 17, 1956, the defendant, Jerome S. Murray, placed a padlock upon said premises, preventing your plaintiff

from entering the same, and deprived him of his right and interest in said
55 lease, and of his right to continue the operation of said restaurant
business. That the action of the defendant, Jerome S. Murray, in preventing and depriving the plaintiff of his possession of said premises will cause him irreparable loss and damage, the loss of business while being so deprived of possession, the destruction of any good will value that the said business may have, and if the plaintiff should be deprived of his possession of said premises he would be forced and compelled to sell the stock of goods, wares and merchandise contained in said premises, together with the fixtures and equipment therein contained, at a very small fraction of its true value. That the said defendant, Jerome S. Murray, as present owner of said premises, acquired the same subject to the existing lease, and with full knowledge of the existing conditional bill of sale, duly recorded as aforementioned. That the plaintiff will suffer great damage, whereas, the defendant, Jerome S. Murray, upon the receipt of rent in accordance with said lease, can suffer no damage. The plaintiff has no adequate remedy at law.

WHEREFORE, the plaintiff prays:

1. That the defendant, Jerome S. Murray, may be enjoined and restrained from interfering with the possession of the premises, 615 D Street, N. W., and that he be ordered and required to remove the padlock from said premises, and restore the same to the plaintiff herein in accordance with the lease hereinbefore mentioned;
2. That the defendant, Emily G. Fort, may be enjoined and restrained from surrendering her rights and interests in said lease to the said Jerome S. Murray;
3. That the defendants, their agents, servants and employees may be enjoined and restrained from in any manner interfering with the possession of said premises by the plaintiff.
4. That the plaintiff may be awarded damages in the amount of ten thousand dollars (\$10,000.00) for loss in his said business by being illegally and unlawfully deprived thereof.
5. That the plaintiff may be awarded reasonable counsel fees and costs.

56 6. That the plaintiff may have such other and further relief as to this Honorable Court may seem meet and proper.

/s/ H. Nathaniel Blaustein
Attorney for the Plaintiff
436 Tower Building

[Verification]

[JURAT dated January 27, 1956.]

57

PLAINTIFFS EXHIBIT NO. 1

LEASE AGREEMENT

This Agreement

Made this 19th day of February A. D. one thousand nine hundred and fifty-four (1954), by and between Michael A. Anselmo, Ursula T. Anselmo and Louise Michalowicz of Metropolitan Washington, D. C. parties of the first part, and Samuel A. DeVito of Washington, D. C. party of the second part, hereinafter described as lessors and lessee, respectively:

WITNESSETH, That the said lessors, for and in consideration of the sum of Fourteen Thousand Forty & 00/100 Dollars (\$14, 040. 00) rent, and also the covenants, conditions, and agreements herein contained, and on the part of the lessee to be paid, kept, and performed, and for no other consideration except as herein expressed, do hereby let and rent to the said lessee and he has hereby taken as tenant of the lessors the following described premises, situate, lying and being in the District of Columbia and known and designated as and being 615 D Street, Northwest for the term of six (6) years to commence with the 1st day of August, A. D. 1954, and to end on the 31st day of July A. D. 1960, at the said rent of Fourteen Thousand Forty & 00/100 Dollars (\$14, 040. 00), payable without demand at Office of the Guaranty Realty, Inc. in monthly installments of \$190. 00 for the first three years and \$200. 00 from August 1, 1957 to the termination of this lease in advance on the 1st day of each and every month during said term, beginning for

the first of said payment on the 1st day of August 1954, the receipt of one dollar (\$1) of said rent paid by said lessee is hereby acknowledged by said lessors.

And the said lessee covenants and agrees to pay said lessors the said rent as aforesaid for the full term hereof; that he will not assign this lease or any portion of the term, or sublet the premises or any part thereof, without the written consent of the lessor; that the said lessee will not use or suffer to be used said premises for any disorderly or unlawful purposes, or for any other purpose than a restaurant; that he will not suffer or commit any waste to, in, or upon the said building, fixtures, and premises; that he will at his own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and proper sanitary condition, all of which premises are now in such condition and repair, remove snow and ice from the sidewalks thereof, and the lessors or assigns shall not be liable therefore or for any work or materials furnished said premises, and the said lessee has no authority to incur any debt or make any charge against the lessors or assigns or create any lien upon the said leased property for any work or materials furnished the same.

58 It is further provided that the lessors shall keep the roof in good repair and repair any leaks to underground plumbing that may occur. All other repairs are to be made by lessee and at his expense.

It is also further understood and agreed that the lessor will keep the plate glasses insured or replace them if broken, and that the lessors reserve the right to inspect the premises within reasonable hours.

It is further agreed that permanent fixtures shall remain as part of the building and that no movable fixtures shall be removed from the premises during the term of this lease without the written consent of the lessors.

Lessee agrees to comply with the rules and regulations of the Health Department, Fire Department and the Fire Underwriters' Association of the District of Columbia.

59 And the lessee agrees that he will at the end of his tenancy surrender the said leased premises in such substantial condition and good repair, good working order, etc., as aforesaid, and clean, ordinary wear and tear and loss by fire and storm excepted; that he will also pay all charges for gas, electricity, and water used on said premises when the bills therefor become due and payable; that he will not make any alterations or changes in said premises, without written consent, or increase the rate of fire insurance upon the building and improvements upon said premises beyond an ordinary risk.

It is further agreed that payment of rent shall cease if the said premises shall be destroyed by fire, or be so damaged by fire or any unavoidable casualty as to make the same uninhabitable, and either party may forthwith terminate this lease by written notice to that effect.

Provided always, that if the rent aforesaid, or any installement thereof, shall not be paid within five days after the same becomes due and payable as aforesaid, although no demand shall have been made for the same; or if the lessee or his assigns shall fail or neglect to keep and perform each and every of the covenants, conditions, and agreements herein contained and on the part of the said lessee to be kept and performed, or if the same or any of them shall be broken, then and in each and every such case from thenceforth and at all times thereafter, at the option of the lessors or their assigns, the lessee's right of possession shall thereupon end and determine, and the lessors or their assigns shall be entitled to the possession of said leased premises, and to re-enter the same without demand of rent or demand of possession of the said premises, and may forthwith proceed to recover possession of the said leased premises by process of law, any notice to quit or of intention to exercise said option, or to re-enter the same being hereby expressly waived by the lessee and his assigns.

And in the event of such re-entry by process of law, or otherwise, the lessee nevertheless covenants and agrees to remain answerable for any and all damages, deficiency or loss of rent which the lessors may sustain by such re-entry and the lessors reserves full power, which is hereby acceded to by the lessee, to re-let the said premises for the

benefit of the lessee.

And the lessee expressly covenants and agrees to pay said rent as aforesaid, and also keep and perform each and every of the covenants, conditions, and agreements herein contained.

It is mutually agreed that this lease shall bind the executors, administrators, and assigns of the respective parties hereto.

And it is further agreed, that no waiver of any breach of any covenant, conditions, or agreement herein shall operate as a waiver of the covenant, condition, or agreement itself, or any subsequent breach thereof.

IN TESTIMONY WHEREOF The said parties have hereunto signed their names and affixed their seals the day and year first hereinbefore written.

/s/ Michael A. Anselmo [SEAL]
 /s/ Ursula T. Anselmo [SEAL]
 /s/ Louise A. Michalowicz [SEAL]
 /s/ Samuel A. DeVito [SEAL]

60

April 27, 1954

For value received I hereby transfer all my rights, title and interest in this agreement to Emily G. Fort, agreeing to remain liable to the lessors for compliance of the conditions and covenants of this lease in the event of failure by the transferee.

/s/ Sam DeVito

For value received and by affixing my signature hereto I hereby accept this lease with all of its conditions and covenants as if originally signed by me.

/s/ Emily G. Fort

The above transfer of this lease under the conditions indicated is hereby approved.

/s/ Mr. L. Gatli, (Treas.)
 Guaranty Realty, Inc.

April 21, 1955

We hereby agree to the above assignment.

/s/ Michael A. Anselmo
 /s/ Ursula T. Anselmo
 /s/ Louise A. Michalowicz

Lease-Agreement
615 D Street, N. W.
Fort, Emily G.
JO. 2-0903

To

F. Leslie Fort
4208 4th St. S. E.

Premises: 4021 3rd St. S. E.

Rent: \$190 - 200

Term: 6 yrs. lease

Commencing: \$190.00 per mo. to July 31, 1957

\$200.00 per mo. to July 31, 1960

[Due - Jack Stone \$3,162.24]

61 [Filed February 2, 1956]

SUGGESTION OF BANKRUPTCY
BY EMILY G. FORT

Now comes the defendant, Emily G. Fort, by and through her attorney, Allen W. Hoage, and respectfully suggests to the Court that she filed in this Court on January 30, 1956 a voluntary petition for bankruptcy No. 8-56. The plaintiff and the defendant, Jerome S. Murray were listed in said petition as being creditors of the bankrupt and since the allegations of the Bill of Complaint are entirely between the plaintiff, and defendant, Murray, and the fact that said Emily G. Fort has turned her lease and keys over to the plaintiff, and a set of keys over to the defendant, Murray, and through her attorney has advised counsel for both of said parties that she was abandoning the restaurant business on the premises in question. She herewith makes proffert of a written statement that she is abandoning said premises in order to terminate further liability on her part under said lease.

/s/ Alden W. Hoage
Attorney for Defendant
503 F Street, N. W.
Washington 1, D. C.

[Verification]

[JURAT dated Feb. 1, 1956.]

62

DEFENDANT FORT EXHIBIT "A"

[Filed Feb. 2, 1956]

Washington, D. C.
January 17, 1956

TO WHOM IT MAY CONCERN:

I hereby give possession of premises at 615 D Street, N. W., Washington, D. C. to Jerome S. Murray, since I am unable to continue as tenant. Herewith are submitted the keys to said premises.

Very truly yours,
/s/ Emily G. Fort

63

[Filed April 30, 1956]

ANSWER TO COMPLAINT BY DEFENDANT
JEROME S. MURRAY

The defendant, Jerome S. Murray respectfully represents to the Court as follows:

FIRST DEFENSE

The Complaint filed herein fails to state facts sufficient to form a basis for any relief or to state a cause of action.

SECOND DEFENSE

1. Defendant admits the making of a lease referred to in Paragraphs One and Two of the Complaint but further says that in connection with this that he was not a party to its making renewal or extension.

2. Defendant has no actual knowledge of the matters referred to in Paragraph Three and does not admit nor deny the same.

3. In reply to Paragraph Four, defendant denies that plaintiff retook possession and says that at the time alleged the restaurant was in a completely run down condition and had been closed by the defendant, Fort because of insufficient revenue from the operation to continue the same. Defendant denies that the aforementioned lease conferred any right whatsoever for reentry by the plaintiff.

4. Defendant admits the allegations of Paragraph Five.

64 5. Defendant after receiving possession from defendant, Fort did place a padlock upon the door to protect the interests of those concerned and from that time has continued in possession of the premises and has from time to time upon application of those interested admitted them to the premises. Defendant denies that there was any substantial value to the goods, wares and merchandise at the time he took possession from the defendant, Fort or of the fixtures as alleged and says that the restaurant was no longer in operation and had no good will whatsoever.

Whereupon, the premises considered the defendant prays that upon hearing the complaint be dismissed.

/s/ Jerome S. Murray

/s/ Denis K. Lane
Attorney for Defendant

[Verification]

[JURAT dated April 30, 1956]

[Certificate of Mailing]

70 [Filed May 10, 1958]

JUDGMENT

This cause came on for trial and final hearing at this term, and thereupon, upon consideration of all evidence and testimony adduced in the cause, ~~including that of the plaintiff, Samuel DeVito, and defendant, Jerome S. Murray, and the Court finding as a matter of law that the plaintiff, Samuel DeVito, was entitled to possession of premises 615 D Street, Northwest, in the District of Columbia, and that as a matter of fact the defendant, Jerome S. Murray, wrongfully deprived the said plaintiff of possession, the said plaintiff, Samuel DeVito, is, therefore, entitled to damages,~~ ^{having made findings of fact and conclusions of law} it is by the Court this 19th day of May 1958,

ADJUDGED, ORDERED AND DECREED that judgment be and the same is hereby awarded to the plaintiff, Samuel De Vito, against the defendant, Jerome S. Murray, in the amount of three thousand dollars (\$3,000.00), and costs.

/s/ Alexander Holtzoff
Judge

71 [Filed May 21, 1958]

NOTICE OF APPEAL

Notice is hereby given this 21st day of May, 1958, that Defendant Jerome S. Murray hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of May, 1958, in favor of Plaintiff, Samuel A. deVito against said Defendant, Jerome S. Murray.

/s/ Denis K. Lane
Attorney for Defendant

Mail to:

H. Nathaniel Blaustein
Attorney for Plaintiff

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 [Filed June 30, 1958]

Washington, D. C.
April 3, 1958.

The above-entitled matter came on for trial before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at approximately 10:50 o'clock a. m.

APPEARANCES:

On behalf of the Plaintiff:

H. NATHANIEL BLAUSTEIN, ESQ., and
HERMAN MILLER, ESQ.

On behalf of the Defendants:

DENIS K. LANE, ESQ.

* * * * *

22 MR. MILLER: We are willing to stipulate the following facts:

That on February 19, 1954, a written lease was entered into by parties

23 who I will call Anselmo, a group of people who were the owners of the property, and they had a right to make the lease; that lease was made to the plaintiff in this case for a six-year term; after the lease had gone about a year and a half the plaintiff in this case, who at that time operated a restaurant at the location, entered into a contract February 10, 1954 to sell the business, the good will and the lease to Mrs. Fort,

and, as part of the transaction, took back a conditional contract of sale whereby he reserved, meaning the plaintiff, reserved the legal title and ownership of the business, the good will and the lease; and that conditional contract of sale was recorded among the land records of the District of Columbia on March 30, 1954.

We will also stipulate there was a written assignment from Mr. DeVito, the plaintiff in this case, in blank, to the purchaser to the fact that it is in blank and would make no difference --

* * * *

MR. MILLER: Well, in the assignment there was a provision to the effect that the assignment was made and that the plaintiff, as the lessee, agreed to remain liable to the lessors for the compliance of the conditions and covenants of the lease in the event of failure by the transferee, meaning Mrs. Fort. Mrs. Fort accepted that assignment
24 and agreed to become liable for the terms of the lease, and at that time Mr. Murray, the defendant in the case, was not the owner of the property but the Anselmos were, and they consented to that assignment or subletting, and thereafter, Mr. Murray bought the property, which would be subject to the lease.

We will stipulate to that. We will stipulate that on January 13, 1956, Mrs. Fort notified Mr. DeVito, the plaintiff, that she was unable any longer to continue the operation of the business and at that time Mr. DeVito had still coming to him, as part of the purchase price, \$8800, and in order to protect that he was going to go into possession and operate the business.

He was given a key and physical transfer of the lease itself, although there was no actual written memorandum made on the lease; that as soon as he did that, as soon as that happened, Mr. DeVito tendered one month's rent to Mr. Murray, which was the rent then due, and at that time Mr. Murray did not have a key. We had the key and the lease, and Mr. Murray refused to allow us to go into possession.

And then on the 17th of January, three days later, Mr. Murray padlocked the place after, as we understand it, receiving the key; and on the 18th of January --

* * * *

25 MR. MILLER: And on that same date he sent a registered letter returning the check and telling us we had no right to go into possession, which we received on January the 18th.

* * * *

26 THE COURT: Now, Mr. Lane, are you willing to stipulate to the facts as stated by Mr. Miller?

MR. LANE: I am not able to fully stipulate the facts as he stated. I would want to have included in the stipulation --

* * * *

28 THE COURT: It will be stipulated, without stipulating the date, that Emily Fort delivered a key to the premises to Mr. Murray within a
29 few days, one way or the other, as she did another key to DeVito?

MR. LANE: That is stipulated to.

* * * *

40 THE COURT: No, I think both of you gentlemen have clarified the issues. You are both able lawyers and you have met the questions of law head on.

With the consent of the landlord, the tenant, who is the plaintiff in this action, assigned this lease to a third party. The assignment, however, contained an agreement on the part of the tenant to remain liable to the lessors for compliance of the conditions and covenants of the lease in the event of failure by the transferee.

In other words, this was not an assignment which would have resulted in the original tenant becoming bereft of his estate and stepping out of the contractual relation which was originally constituted by the lease. The original tenants still remain liable under the lease by its express terms. Therefore, the contractual obligations as between him and the landlord still persisted. The legal effect of the purported assignment was really to create a sublease to the third party.

41 The sublessee became unable, apparently, to carry on the business for which he subleased the premises from the original tenant and surrendered the premises. He gave one key back to the original landlord and another key to the original tenant. What the sublessee did cannot, of course, affect the property rights of the original tenant nor the

contractual relationship as between the landlord and the original tenant.

Obviously, when the sublease was surrendered the title to the original lease or the original tenancy for four years reverted to the original tenant.

Perhaps it might be more accurate to say that the original tenant never became divested of his original property because the contractual relation between him and the landlord, by the very terms of the document called the assignment, remained in effect.

Since the Court is of the opinion that the tenancy for years created by the original lease had not been affected by the purported assignment, which was really a sublease, the rights of the original tenants, that is, the plaintiff in this case, were never terminated.

By demolishing the property during the terms of the lease, the owner of the property, the lessor, who is the defendant in this action, wrongfully destroyed the plaintiff's property rights and is guilty of a breach of contract.

42 Accordingly, the Court concludes that the plaintiff is entitled to recover, and the defendant is liable for the destruction of the property which had been leased for a term of years to the plaintiff in this action.

*

*

*

*

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,551

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED NOV 1 1958

JEROME S. MURRAY,

Joseph W. Stewart
CLERK

Appellant,

v.

SAMUEL A. DeVITO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. NATHANIEL BLAUSTEIN

Tower Building
Washington, D. C.

HERMAN MILLER

421-4th Street, N. W.
Washington, D. C.

Attorneys for Appellee

QUESTIONS PRESENTED

In addition to the questions presented by the appellant, the appellee states that another question presented is whether, when an original lessee, after execution of the lease by conditional contract of sale, reserving title in himself until full payment of the purchase price, conditionally sells the business carried on in the premises, together with all of the chattels, fixtures and equipment therein, and includes in the conditional contract the lease to said premises held by him, although expressing an assignment of his title and interest in the lease to the vendee, is entitled to possession and to continue as lessee when, thereafter, his vendee is unable to pay the balance of the purchase price due him, and thereupon the vendee returns actual possession, a key to the premises, and the original lease itself.

INDEX

	<u>Page</u>
COUNTERSTATEMENT OF THE CASE	1
STATUTES INVOLVED	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	5

CASES CITED

Campbell v. American Limestone Co., 109 F. Supp. 741	4
Mannix Co. v. L. C. Smith Bros. Typewriter Co., 33 App. D.C. 357	3
Stern Co. v. Rosenberg, 67 App. D.C. 99, 89 F. 2d 843	3

STATUTES

D. C. Code, 1951 Ed. Title 42, Section 101	3
D. C. Code, 1951 Ed. Title 45, Section 106	2
D. C. Code, 1951 Ed. Title 12, Section 301	2, 4

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,551

JEROME S. MURRAY,

Appellant

v.

SAMUEL A. DeVITO,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellee, DeVito, obtained a lease on February 19, 1954 and about a year and a half later, by conditional contract of sale, reserving to himself the legal title, he conditionally sold the business, good-will and lease to a Mrs. Fort. (J.A. 11, 12 and Appellee's App. 1). The conditional sales contract was recorded among the land records. At the same time an assignment, and assumption and a consent was placed on the lease. In the assignment to Mrs. Fort, the appellee agreed to remain liable for the compliance of all of the conditions and covenants

of the lease, all of which was done at a time the appellant had not come into title.

On January 13th, 1956, at a time when the appellant was the owner of the fee, Mrs. Fort was unable to continue the business and still owed the appellee \$8,800.00 under the conditional contract. At that time she gave a key to the building and a physical transfer of the lease itself to the appellee, but no re-assignment was actually noted on the instrument, and thereupon the appellee tendered the appellant the rent then due. (J.A. 12). Mrs. Fort about this time also delivered a key to the appellant and on January 17, 1956 the appellant padlocked the premises and refused entry to appellee, and on that date returned the tendered rent by registered mail. (J.A. 12, 13).

The Court made findings, which are supported by the above evidence, to the effect that because the appellee had not been discharged from his privity of contract with the appellant and was responsible for all of the covenants and obligations of the lease, the relationship of landlord and tenant existed between the appellant and appellee, and the transfer to Mrs. Fort was actually a sub-lease, and Mrs. Fort's surrender merely cancelled the sub-lease, and had no effect on the relationship between the appellant and appellee, and the appellant, by padlocking and demolishing the premises, wrongfully destroyed appellee's property rights for which there was liability. (J.A. 13-14).

STATUTES INVOLVED

Title 12, Section 301 D. C. Code:

Every estate in lands, tenements, or hereditaments for a greater term than one year attempted to be created by parol, or otherwise than by deed, shall be an estate by sufferance.

Title 45, Section 106 D. C. Code:

No estate of inheritance, or for life, or for a longer term than one year, in any real property, corporeal or incorporeal, in the District of Columbia . . . shall be created or take effect, except by deed signed and sealed by the grantor, lessor, or declarant, or by will.

SUMMARY OF ARGUMENT

The Trial Court's position was correct for the following reasons:

1. The appellee's position as lessee was never relinquished because he reserved title to the lease by the conditional contract of sale which expressly provided no title would pass until payment of purchase price due appellee. Secondly, the lease, being for a longer period than one year, did not pass by the purported assignment of DeVito in that it was not under seal.

2. There was ample evidence that possession was re-delivered to the appellee on January 13, 1956 by delivery of the key and physical possession of the lease, and to support the Court's finding that such re-delivery of possession by Mrs. Fort to the appellee occurred before the delivery of any key to the appellant.

ARGUMENT

1. The entire answer to the appellant's argument can be summed up by a reference to the conditional contract of sale whereby the appellee reserved not only title to the lease, but reserved the right of re-entry and retaking in event of default in the terms of such conditional contract by the conditional assignee. The entire argument of the appellant totally ignores this conditional contract. And Judge Holtzoff's conclusion to the effect that the appellee never became divested of his original property and that his estate was not affected by the purported assignment is clearly supported by the conditional contract.

The validity of conditional contracts of sale has long been recognized in this jurisdiction.¹ The conditional contract of sale being recorded, when the appellant acquired the property he took it with knowledge that title to the lease was reserved by the appellee. Title 42, Sections 101 and 103 D. C. Code, 1951 Ed. Supp. V.

¹ Stern Co. v. Rosenberg, 67 App. D. C. 99, 89 F.2d 843; Mannix Co. v. L. C. Smith & Bros. Typewriter Co., 33 App. D. C. 357.

There was every valid reason for the appellee to reserve title in himself since a very large portion of the purchase money was still due him. In view of the fact that the appellee did not surrender his estate but retained it, there was both privity of contract and estate between him and the owner of the property at the time of the conditional contract, and also at the time the appellant succeeded to the ownership of the fee. Not only do all of the appellant's citations support the appellee's position, but others likewise do so.² Having retained ownership of the lesseeship, the appellant Murray violated and ignored the appellee's property rights.

Moreover, title of the leasehold still remained in the appellee. The lease was for a longer period than one year and the original parties sealed it. Title 12, Section 301 required the conveyance of any interest in land for the longer period than one year to be in writing, signed and sealed by the grantor, lessor or declarant. In this case, the assignment made by the appellee did not bear his seal, and consequently by the provisions of Title 12 Section 301 of the Code, the purported assignee merely became a tenant by sufferance. Even under this situation a lesser estate than that held by the appellee resulted, and thereby created a sub-lease, and not a lease whereby the appellee retained a reversion.

2. Factually, the evidence supported the Court's decision that the appellee was in possession at the time the appellant padlocked the premises and that he, the appellee, was free of any estate or interest of the purported assignee. The conditional contract, which also covered the lease, provided that upon default in any payment the appellee was entitled to possession; the purported assignee had on January 13, 1957 delivered the key to him along with a transfer of the physical possession of the lease. What other purpose was to be effected under these conditions except that Mrs. Fort in effect surrendered possession to the appellee? There is no clear statement in the evidence as to when the appellant received his key, and the Court had a right to find that Mrs. Fort had delivered a key, possession and the physical instrument itself to the appellee, but any delivery of the key had been given to the appellant.

² Campbell v. American Limestone Co., 109 F. Supp. 741.

CONCLUSION

The appellee had a substantial interest to protect in turning the business over to Mrs. Fort, and in order to provide himself with protection he no more parted with the legal title to the chattels, good-will and fixtures of the business than the ownership of the lease. The chattels, fixtures and good-will of the business were valueless without the lease, each being complementary. The reservation of title, the result effected by not sealing the purported assignment in law, prevented the assignment of the entire estate of the appellee (an estate for years) and gave to the assignee a lesser estate (an estate by sufferance). That fact, coupled with the fact of surrendering possession and the instrument itself back to the lessee, all total up to the fact that the padlocking and the later demolishing of the building destroyed the appellee's property right, for which the Trial Judge compensated the appellee, and the judgment was correct.

Respectfully submitted,

H. NATHANIEL BLAUSTEIN

Tower Building
Washington, D. C.

HERMAN MILLER

421-4th Street, N. W.
Washington, D. C.

Attorneys for Appellee

(i)

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Conditional Bill of Sale by and Between Emily G. Fort, Purchaser, and Sam DeVito, Seller, Dated the ____ Day of February, 1954, and Filed on the 30th Day of March, 1954	81	1

APPELLEE'S APPENDIX

81 [Filed June 27, 1958]

Plaintiff's Exhibit 2

RECORDER OF DEEDS
WASHINGTON
District of Columbia

This is to certify that the pages attached hereto constitute a full, true, and complete copy of
A CONDITIONAL BILL OF SALE BY AND BETWEEN EMILY G. FORT, PURCHASER, AND SAM DE VITO, SELLER, DATED THE ___ DAY OF FEBRUARY, 1954, AND FILED ON THE 30th DAY OF MARCH, 1954, AT 2:03 P.M.

as the same appears of record in this office.

[Certificate]

[Seal]

82

DISTRICT OF COLUMBIA, ss:

I, B. T. Sanders, a Notary Public in and for said District, DO HEREBY CERTIFY THAT Sam De Vito & Emily G. Fort

part ies to a certain agreement, bearing date the 10th day of February, A. D. 1954, and hereto annexed, personally appeared before me in said District the said Sam De Vito & Emily G. Fort

Sam De Vito & Emily G. Fort being personally known to me as the person s who executed said agreement and acknowledged the same to be their act and deed.

GIVEN under my hand and official seal this 10th day of February, A.D. 19 54

[SEAL]

/s/ B. T. Sanders

IN CONSIDERATION of the sum of one dollar in hand paid I do hereby become responsible to Sam De Vito for the true and faithful performance of the within contract of conditional sale, and the payment of all sums of money referred to in said contract in the same manner and to the same extent as if had originally executed the same as vendee. Should there be any default in said contract upon the part of the original vendee therein named, said Sam De Vito shall have the right to proceed against immediately without any demand or notice of any kind or character and without first proceeding against said original vendee.

WITNESS my hand and seal this 10th day of February, A.D. 19 54.

/s/ F. Leslie Fort [SEAL]

Witness:

/s/ Philip R. Greene

83 CONDITIONAL BILL OF SALE No. 1441 filed March 30, 1954
at 2:03 P. M.

KNOW ALL MEN BY THESE PRESENTS;

That I, Emily G. Fort

residing at 4208 - 47th St. S.E.

 this date obtained from Sam De Vito and Emily G. Fort

the following articles: Air conditioning equipment, bar, bar cooling system, booths, television, 2 refrigerators, 1 freezer, stoves, grease trap, steam table, 2 sinks, glasses, silverware, cooking utensils, fixtures, all stock and equipment now on hand, name and good will of business known as The Commodore Restaurant, located at 615 D Street, N.W., Washington, D.C., subject to transfer of all Federal and District of Columbia Licenses, approval of Board of Health, Building Inspection and Alcohol Control Board, and renewal and assignment of lease of premises; all clear and free of liens, claims and encumbrances whatsoever now outstanding, or later arising against Sam De Vito

 a deposit of \$500.00
valued at \$ 14,825.00, upon which I agree to pay the sum of

\$ 2,500.00 as first payment and a further sum of \$ 230.00 on the 1st of each month beginning May 1, 1954 until the whole sum of \$ 14,825.00 shall be fully paid; and I do hereby agree that the title to the said above described property is to remain vested in said _____

Sam De Vito

until each and every installment of the said purchase money has been paid in accordance with the stipulations hereinafter and hereinbefore set forth.

IT IS FURTHER AGREED with the said Emily G. Fort that she will punctually pay each and every installment to him, his personal representatives or assigns, on the several days and times when the same shall become due; that she will take good care of the property above mentioned and return the same upon her failure to comply with the terms of this agreement in as good condition as a reasonable and proper use and wear of them will permit, she will not mortgage, rent, pawn, dispose of or sell the above articles or any part thereof, or in any manner part with the possession of the said property, or remove the same from the premises 615 D St., N.W., Washington, D. C. without the permission of the said _____

Sam De Vito first obtained in writing, and she will at any time, when so required, exhibit the said property to the said Sam De Vito or his agent, and will give immediate notice of any attempt to levy under any legal proceeding or writ issued against or laid upon such property. And they further agree that if default be made in the payment of any of the said sums hereinbefore mentioned as they shall respectively mature; or if she shall attempt to sell, pawn, or dispose of, misuse or injure any of the said property or any part thereof, or in any manner not comply with this agreement, then it shall be lawful for the said Sam De Vito, and she hereby authorize and empower s him, his heirs, personal representatives, attorneys, or agents to enter upon or into any place where the said property or any part thereof is, or is reasonably believed to be, and to take away and repossess the said property without any opposition or molestation from her, her personal representatives or assigns, or her agents or servants whatsoever. And should she discontinue her payments after having been duly notified, all sums paid by her can be considered as having been paid as rental for the use of the aforesaid property.

I have received the said goods and chattels with the further understanding that the said Sam De Vito and Mrs. Emily G. Fort hereby agree if at any time during the period mentioned in this agreement she

shall desire to have the title to the said property pass and be transferred_____,
he will make and deliver to me a good and sufficient bill of sale therefor
 upon the payment of all the purchase price hereinbefore mentioned.

I, however, hereby expressly agree, as aforesaid, that no title
 to the said property, either legal or equitable, shall vest in me except
 as bailee, unless I shall pay the full amount of the purchase price as
 hereinbefore provided for. And I further agree that in the event of
 suit being instituted by the said Sam De Vito

_____ caused by failure to comply with the above-
 mentioned terms, an attorney's fee of ^{\$100}~~\$10~~ shall be allowed said _____

Sam De Vito

No cause or stipulation of this agreement shall be deemed rescinded as against
 the said Sam De Vito
 unless such recission is in writing and signed by the said Sam De Vito

IN WITNESS WHEREOF we hereunto place our hands and
 seal s at the city of Washington, D. C., this _____ day of
February in the year Nineteen Hundred and Fifty-four

Attest:

/s/ Samuel A. De Vito [SEAL]

/s/ Philip R. Greene

/s/ Emily G. Fort [SEAL]

